

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE (202) 424-7647

WILLIAM L. FISHMAN
DIRECT DIAL (202) 945-6986
WL.FISHMAN@SWIDLAW.COM

DOCKET FILE COPY ORIGINAL

NEW YORK OFFICE
405 LEXINGTON AVENUE
NEW YORK, NY 10174

November 3, 2000

RECEIVED

NOV 3 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARYVIA MESSENGER

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., CY-B402
Washington, D.C. 20554

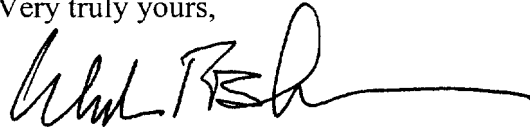
Re Verizon-New England, CC Docket No. 00-176

Dear Ms. Salas:

Enclosed please find an original and one copy of RCN BecoCom's Reply Comments in connection with the application of Verizon-New England *et al* for authority under section 271 of the Communications Act to offer interLATA service in the commonwealth of Massachusetts. An additional 12 copies are being filed simultaneously with Janice Myles and one is being sent to International Transcription Service. A copy of this letter and RCN's Reply Comments have also been sent by first class and electronic mail to all parties of record.

Please address any questions to undersigned

Very truly yours,



William L. Fishman

Enclosure

Verizon, Massachusetts
271 Application
Reply Comments of RCN
November 3, 2000

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

NOV 3 2000

In the Matter of

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Application by Verizon New England Inc.,)
Bell Atlantic Communications, Inc. (d/b/a)
Verizon Long Distance), NYNEX Long)
Distance Company (d/b/a Verizon Enterprise)
Solutions), and Verizon Global Networks, Inc.,)
for Authorization To Provide In-Region,)
InterLATA Services in Massachusetts)

CC Docket No. 00-176

**REPLY COMMENTS
OF
RCN-BECOCOM, L.L.C.**

William L. Fishman
SWIDLER BERLIN SHEREFF FRIEDMAN, LLC
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
Telephone: (202) 945-6986
Facsimile: (2102) 424-7645

Counsel to RCN-BecoCom, L.L.C.

November 3, 2000.

SUMMARY

RCN-BecoCom, L.L.C. ("RCN") is a facilities-based CLEC and cable overbuilder which has been operating in Massachusetts since 1997. RCN's business plan emphasizes service to the residential market, unlike most CLECs which emphasize commercial subscribers. Because RCN needs to bring its fiber optic wiring to every residence in each community in which it plans to operate, it must have access in each community to poles and conduits to a greater extent than other new entrants. In communities in which RCN's partner, a subsidiary of a local electric utility co-owns the poles, RCN has been able to provide service within approximately one year of the date on which construction is initiated. But in communities where its partner cannot provide it with access to poles, it is necessary to reach agreement with Verizon for pole access.

RCN has been unable to expeditiously arrange such access, however, because Verizon, with which it competes for various kinds of telecommunications services, has unreasonably, unlawfully and discriminatorily refused to permit RCN to access empty space on those poles where the presence of existing wiring requires a lengthy "make-ready" process, even though Verizon has itself used or allowed others to use such empty space. Although Verizon has imposed a number of unreasonable limitations on RCN's access to its poles, the principle barrier has been Verizon's refusal to permit RCN to "box" poles. Boxing simply involves placing wiring on the non-street side of a pole whose street side is already heavily laden with wiring. By putting the RCN wiring on the side of the pole with little or no wiring, pole access would be greatly facilitated and expedited.

The record shows that some 20% of the Verizon poles in one community chosen to be representative of many suburban Boston communities – Quincy, MA – are already boxed, but

Verizon refuses to permit RCN to box the other 80%. Although it has from time to time contended that boxing was unsafe, or violative of industry codes, it now admits these problems do not exist, yet it continues to refuse to permit RCN to box poles. In its Opposition RCN noted that although it has paid hundreds of thousands of dollars to Verizon and to the poles' co-owner, more than 12 months after filing licenses for pole attachments RCN has not yet been able to attach its wiring to a single pole and at the rate it is progressing will need four years to wire the City of Quincy, bringing it into conflict with the two year cable build-out obligation contained in its franchise. RCN has provided documentary evidence that pole boxing is fully consistent with all applicable industry codes and is widely practiced by utilities around the country. Even Verizon allows pole boxing in the states of New York, Pennsylvania and New Jersey. Such denial of access is a flagrant violation of the important principle embodied in section 224 of the Communications Act that pole-owning utilities must allow CLECs and cable companies to access their poles on nondiscriminatory terms and conditions. Indeed, FCC precedent interprets section 224 to impose an affirmative obligation on pole owners to seek in good faith all feasible means to provide attachers with space on their poles. This fundamental principle has been iterated and reiterated by the Commission many times since passage of the Telecommunications Act of 1996.

In these Reply Comments RCN addresses itself to the Evaluation of Verizon's section 271 application submitted to the Commission by the Massachusetts Department of Telecommunications and Energy ("MDTE"). RCN respectfully disagrees with that

recommendation. The MDTE's conclusion that Verizon has fully opened up its market to competition under the criteria set forth in section 271(c)(2)(B)(iii) (access to poles, conduits, ducts, and rights-of-way) is unjustified by the record. It is based on casual acceptance of Verizon's broad generalities; ignores the burden of proof tests which apply to Verizon, misinterprets relevant Commission precedent, and even appears to misunderstand the thrust of section 271 of the Act. The MDTE's conclusion that Verizon can box its poles but not permit RCN to do so simply because Verizon will no longer permit any CLEC to do so is inconsistent with FCC precedent which establishes a very strong presumption that pole owners must allow nondiscriminatory access to their poles except for limited circumstances, none of which apply to the present case. The MDTE's approval of Verizon's overtly discriminatory practices in respect to pole attachments in Massachusetts is difficult to comprehend but must not be endorsed by the Commission itself.

By contrast the Evaluation provided by the Department of Justice raises serious questions about the sufficiency of Verizon's showing, including its failure to fully address the issue of boxing poles – an issue which the DOJ asserts deserves "careful attention" because RCN's accusations, if true "could substantially delay the emergence of an additional facilities-based provider."

RCN continues to urge the Commission to reject Verizon's application for its failure to meet checklist item # 3 in respect to pole attachments.

TABLE OF CONTENTS

SUMMARY	i
I. THE MDTE'S APPROVAL OF VERIZON'S MARKET-OPENING EFFORTS IN MASSACHUSETTS IS BASED ON A MISUNDERSTANDING OF ITS OWN RECORD, MISINTERPRETATIONS BOTH OF SECTIONS 224 AND 271 OF THE ACT, AND OF FCC PRECEDENT.	6
A. In General	7
B. Little Weight Should Be Accorded MDTE's Views	11
C. The MDTE Misunderstands Sections 224 and 271 Of The Act	12
1. Protection of existing facilities	15
2. No undue effect on any CLEC or unfair advantage to Verizon	16
D. The MDTE Evades the Holding in <i>Cavalier Telephone Co. L.L.C. v. Virginia Electric and Power Co.</i>	19
II. THE MDTE'S EVALUATION IS ENTITLED TO NO WEIGHT WHATSOEVER WHILE THE MDTE IS RECONSIDERING THE VERIZON PERFORMANCE ASSESSMENT PLAN	23
III. IN QUINCY ALONE, VERIZON'S UNLAWFUL DISCRIMINATORY BEHAVIOR DEPRIVES THE PUBLIC ANNUALLY OF SOME \$1.6 MILLION IN SAVINGS AND RCN OF SOME \$1.5 MILLION IN OPERATING CASH FLOW	25
IV. CONCLUSION	26

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Application by Verizon New England Inc.,)	
Bell Atlantic Communications, Inc. (d/b/a)	
Verizon Long Distance), NYNEX Long)	
Distance Company (d/b/a Verizon Enterprise)	CC Docket No. 00-176
Solutions), and Verizon Global Networks, Inc.,)	
for Authorization To Provide In-Region,)	
InterLATA Services in Massachusetts)	

**REPLY COMMENTS
OF
RCN-BECOCOM, L.L.C.**

RCN-BecoCom, L.L.C. ("RCN"), pursuant to the Public Notice issued in the above-captioned matter on September 22, 2000,¹ by the undersigned counsel, herewith submits its Reply Comments. On October 16th, 2000, RCN filed an Opposition to the application of Verizon for interLATA authority within the Commonwealth of Massachusetts. RCN's Opposition was premised on Verizon's notable failure to comply with the market-opening obligations set forth in section 271(c)(2)(B) of the Communications Act,² the so-called "checklist items." More specifically, RCN alleged that Verizon has not complied with checklist item # 3, *i.e.* the provision of access to poles, conduits, ducts, and rights-of-way because it discriminates against

¹ Public Notice DA 00-2159.

² 47 U.S.C. § 271(c)(2)(B).

RCN with respect to the attachment of RCN's cable to Verizon's poles and because it has not fulfilled its statutory duty to affirmatively seek ways to attach RCN's wiring to its poles.

Verizon's practices and policies in regard to checklist item # 3, while overlaid with the thin veneer of cooperation to be expected of a section 271 applicant, are based on, and advance, the market-ordering proclivities of a monopolist. Contrary to Verizon's rote assurances, Verizon does not provide access to poles in Massachusetts consistent with the requirements of sections 224 , 251, and 271 of the Act. In fact, Verizon maintains a pole access regime which discriminates against and among non-affiliated attachers, is hostile to such attachers, and which inhibits and delays the competitive provision of telecommunications, ISP and cable service to retail subscribers in Massachusetts.

RCN demonstrated by reference to the "ground truth" in one representative Massachusetts community – the City of Quincy – that while Verizon has boxed some 20% of the 9,500 poles there, it refuses to allow RCN to similarly box any of the remaining 80%. By reference to sworn declarations of some five experienced experts in the pole construction field, RCN showed that the boxing of poles is safe, consistent with all applicable industry codes including the Bellcore Bluebook, and is widely practiced by pole-owning utilities, including Verizon itself in other states. RCN demonstrated by reference to the record made at the Massachusetts Department of Telecommunications and Energy ("MDTE") that Verizon offered one excuse after another for refusing to let RCN box the poles in Quincy, but could provide no factual support for any of its articulated reasons. The Opposition noted that while RCN is able to

build out, *i.e.*, to attach its wiring to the aerial plant in an average sized suburban Boston community in a year when it has access to poles jointly owned by its partner, BecoCom, it has yet to attach wiring to a single pole in Quincy, more than a year after the pole attachment application process began, and after RCN has paid out some \$478,000 dollars to Verizon and Mass Electric for applications, survey, and make-ready work.

RCN contended that its inability to box poles in Quincy has led to substantial delay in the fulfillment of its franchised obligations to establish a competitive cable system in Quincy, and equally has delayed its provision of telephone service in Quincy competitive with that offered by Verizon. RCN noted that, while Verizon's unjustified refusal to allow RCN to access its poles has kept RCN from building out its system, Verizon was moving ahead with the roll out of its own DSL service in Quincy.³

RCN's concern about discriminatory access to Verizon's poles is echoed in the October 27th, 2000 Evaluation of Verizon's application provided by the Department of Justice. In that filing, DOJ notes that RCN's allegation that Verizon is not compliant with checklist item # 3 "deserves careful attention because the alleged failure, if true, could substantially delay the emergence of an additional facilities-based provider."⁴

³ As noted by the Department of Justice in its October 27, 2000 Evaluation of the Verizon application, Verizon is the largest provider of DSL service in Massachusetts, adding four times as many DSL lines per month as all other CLECs combined. DOJ Evaluation at 7. If RCN cannot get on the poles Verizon jointly owns, it cannot offer competitive services.

⁴ *Id.* at 7, n.28. The DOJ also notes that its inability to fully evaluate RCN's allegation arises out of Verizon's failure to fully address them in its application.

These Reply Comments will not reiterate RCN's allegations, nor the factual bases for them which are found in the record. Instead, RCN will quantify evidence of the financial loss suffered by the public due to its inability to subscribe to RCN's services, and the commercial harm RCN is suffering from Verizon's unlawful discriminatory practices in Quincy (and elsewhere). RCN also responds to some questions which have been raised in RCN's discussions with regulators, comments on the unjustified findings of the Massachusetts MDTE that Verizon is in complete compliance with section 271, and briefly addresses Verizon's unlawful effort to exclude the use of craftspeople other than its own for make-ready work. Finally, RCN will comment on issues involving the Performance Assessment Plan approved by the MDTE, and which is currently subject to reconsideration before that Commission.

Before addressing these specific issues, however, RCN wishes to further elaborate on the differences it encounters in building out its system in a BecoCom community, and in a non-BecoCom community, particularly since Verizon is the communications utility in both circumstances. In its Opposition RCN noted that, on average, it has been able to build out its new systems in approximately one year in communities in which BecoCom is its partner.⁵ In these communities pole boxing is not necessary because RCN and BecoCom have agreed to attach RCN's communications wires in the supply, or electrical, space on the pole. Notably, in all of the 12 Massachusetts communities in which RCN is operating, it has attached its wires in

⁵ See RCN Opp. at 4.

the supply space used by BecoCom.⁶ It therefore does not need to attach in the communications space, and therefore need not negotiate attachment terms and conditions with Verizon.⁷ It is only in communities in which Mass Electric, or some electric utility other than RCN's partner is the joint pole owner, that RCN must approach Verizon, and it is in those communities in which RCN has been severely delayed in attaching its wiring to the poles. Because the great majority of the Boston area communities designated by RCN in its original OVS application are not served by RCN's electric utility partner, Verizon's refusal to cooperate poses a very widespread problem for RCN.⁸

⁶ See RCN Opp., App. G at 21.

⁷ In its letter to the Mayor of Quincy, which appears in App. A to RCN's Opposition, Mass Electric indicates that it does not favor boxing on its poles. Lest this unwillingness to authorize boxing by Mass Electric give comfort to Verizon, it should be noted that boxing in the supply, or electrical space, is an entirely different matter as compared with boxing in the communications space because of the presence of energized electrical wiring in the former. Moreover, there is in fact widespread boxing in the electrical space on Mass Electric's poles. In Quincy alone 1,712 of Mass Electric's poles are already boxed. RCN has found Mass Electric more cooperative than Verizon; that does not mean however, that RCN is in complete agreement with Mass Electric on all its pole attachment policies. In any case Mass Electric's views or actual practices concerning boxing is not the issue currently before the Commission.

⁸ Of the 48 communities originally designated by RCN in its OVS certification, BecoCom is the electric utility in 40, making it necessary in the remainder to negotiate pole attachments with other electric utilities for supply space attachment or, failing that, to negotiate with Verizon in the communications space. In a limited number of towns, such as Wakefield, Belmont, and Hudson, RCN is negotiating with the municipal light company. In one case – Wakefield – RCN has been allowed to attach in the supply space.

I. THE MDTE'S APPROVAL OF VERIZON'S MARKET-OPENING EFFORTS IN MASSACHUSETTS IS BASED ON A MISUNDERSTANDING OF ITS OWN RECORD, MISINTERPRETATIONS BOTH OF SECTIONS 224 AND 271 OF THE ACT, AND OF FCC PRECEDENT.

As contemplated by section 271(d)(2)(B) of the Act, the MDTE conducted its own section 271 proceeding on the question of Verizon's market-opening performance. An extensive record was made at the MDTE. On October 16, 2000, simultaneously with the filing of initial comments in this proceeding, the MDTE released its own Evaluation which concluded that Verizon has fully complied with the 14 point checklist and that the public interest would be served by authorizing Verizon to enter the interLATA market in Massachusetts.⁹ RCN appreciates the substantial time and energy devoted by the MDTE to the issue of Verizon's section 271 application, but respectfully disagrees with the MDTE's conclusions. That is perhaps not surprising since RCN has a commercial interest in securing access to Verizon's poles in Massachusetts. In approving Verizon's application, however, the MDTE reaches conclusions which are not supported either by the Massachusetts Attorney General or by the Department of Justice. Specifically, the MDTE disregarded the recommendation of the Massachusetts Attorney General, who concluded that Verizon had not complied with its market-opening obligations in respect to checklist item # 3.¹⁰ The MDTE's conclusion is also at odds with the DOJ which concluded that Verizon had not demonstrated that it provides nondiscriminatory access to poles

⁹ MDTE Evaluation, at 1, *passim*.

¹⁰ Comments of Massachusetts Attorney General, at 6-7.

and that RCN's allegations in this respect "deserve careful attention."¹¹ Fundamentally, RCN believes that the MDTE Evaluation reflects a misunderstanding of the market-opening obligations of a BOC in the post-1996 legal climate.

A. In General

The MDTE's decision, involving a complex record and conflicting claims, is noteworthy for its complete failure to address the fundamental matter of burden of proof. This Commission has made clear, as RCN noted in its initial Opposition, that the burden of proof rests squarely on the applicant.¹² Yet the MDTE nowhere establishes where the burden of proof lies or indicates specifically that Verizon has fulfilled that obligation. The MDTE does note that section 224 of the Communications Act permits a utility to deny access to poles or conduits on a nondiscriminatory basis "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."¹³ However, it proceeds to find no fault with Verizon's pole attachment policies without ever once addressing individually any of these

¹¹ DOJ Evaluation, at 7 n.28.

¹² RCN Opposition, at 12, n. 7.

¹³ MDTE Evaluation, at 225, quoting from 47 U.S.C. § 224(f)(1). Although the MDTE simply cites to § 224 without acknowledging that this language applies only to electric utilities, the Commission has concluded that it is generally applicable to non-electric utilities. *See Local Competition First Report and Order*, 11 FCC Rcd at 16080-81, ¶¶ 1175-77. On Reconsideration, at 14 FCC Rcd 18049, commenting on this observation, the Commission cautioned that, with respect to non-electrical utilities' denials of access, "the issues will be very carefully scrutinized, particularly when the parties concerned have a competitive relationship. Thus, non-electrical utilities generally must accommodate requests for access, except for reasons of capacity, safety, reliability and generally applicable engineering purposes that cannot reasonably be ameliorated by modification." *Id.* at ¶ 11 (footnotes omitted).

specific statutory criteria. Perhaps that is because there is nothing in the MDTE's record that could conceivably sustain the denial of the right to box poles for any of these reasons.

In fact the MDTE's decision reflects selective and one-sided interpretations of its own extensive record, a fundamental misunderstanding of sections 224 and 271 of the Act, an erroneous interpretation of recent FCC precedent, and logic that can only be characterized as outcome-oriented. Its discussion with respect to checklist item # 3 relies heavily on the aggregate and generalized assertions tendered by Verizon.¹⁴ Access to poles is discussed only briefly.¹⁵ The MDTE's conclusion with respect to pole boxing is set forth in one paragraph:

With respect to RCN's position that VZ-MA engages in the practice of boxing poles in Quincy but prevented RCN from doing the same, we note that VZ-MA has admitted that VZ-MA-owned poles were previously boxed in Quincy, [but] this is no longer the practice. VZ-MA also states that boxing of VZ-MA's poles does not occur at new facilities because of VZ-MA's concern for its own facilities and the facilities of other attachers on the pole. Therefore, the Department finds that VZ-MA's prohibition on boxing is not an unnecessary restriction on licensees because the policy is designed to protect existing facilities on poles and because VZ-MA's policy does not unduly affect any particular licensee or unfairly advantage VZ-MA. In addition, we find that VZ-MA's boxing policy is nondiscriminatory because VZ-MA no longer boxes for itself.¹⁶

MDTE similarly finds that Verizon's pole license agreements are "reasonable, nondiscriminatory and comply with the requirements set forth in the Act,"¹⁷ and concludes that

¹⁴ MDTE Evaluation, at 224-250.

¹⁵ *Id.*, at 232-237.

¹⁶ *Id.*, at 247 (footnote citations to record references omitted.)

¹⁷ *Id.*, at 241.

Verizon's procedures for make-ready and issuance of licenses "do not violate the FCC's guidelines because Verizon's "make-ready policy does not impede, in any way, a CLECs' [sic] ability to access poles and conduits."¹⁸ The MDTE finds that Verizon's make-ready policy is also reasonable insofar as it requires the use of Verizon's own workforce¹⁹ and that Verizon responds in a timely manner to CLECs' applications for pole, conduit, and duct access.²⁰ Similarly, MDTE concludes that the 2,000 pole limit "prevents a single CLEC from using all of [Verizon's] resources for one request, thereby crowding out other requesters."²¹ Indeed, notes the MDTE, the limitation serves a "useful purpose for CLECs" by facilitating access to poles "in an expedited manner."²²

Verizon's make-ready work estimates are reasonable, according to the MDTE, because they are "sufficiently explained to the licensee," and because Verizon has "charged the same pole attachment rates for over 20 years."²³ If a licensee does not agree, MDTE notes, it can file an action alleging that the rate is unreasonable.²⁴ The MDTE approves Verizon's overlash procedures and rejects the complaint that Verizon requires a CLEC to do more paper work than

¹⁸ *Id.*, at 243.

¹⁹ *Id.*, at 244.

²⁰ *Id.*, at 246.

²¹ *Id.*, at 248 (footnote record citation omitted).

²² *Id.*, at 248.

²³ *Id.*

²⁴ *Id.*

Verizon itself with respect to over-lashing on the grounds that it "would be an idle and formalistic exercise and nothing more" to require Verizon to provide notice and comply with the overlash procedures, as is required of CLECs.²⁵ The MDTE then concludes that, while some parties challenged Verizon on checklist item # 3, "the record is not sufficient to support any contention that [Verizon] denied access to any pole, duct, conduit, or right-of-way in a discriminatory manner or imposed a rate, term or condition that was unreasonable."²⁶ These conclusions are so far divorced from the preponderance of the evidence in the record made before the MDTE that one must question how carefully the MDTE has considered that record.²⁷ However, in order to focus on the one remedy which would alone substantially accelerate the buildout of its system, RCN confines itself in these Comments to Verizon's unlawful restriction on RCN's access to Verizon's poles by "boxing" them.

²⁵ *Id.*, at 249.

²⁶ *Id.*, at 250. Again, the MDTE invites those claiming discriminatory treatment to file a formal complaint with the MDTE.

²⁷ Even allowing for the massive record before it, there are troublesome instances of a misreading of the record in the MDTE's Evaluation. For example, at 233 n.11 of the Evaluation, MDTE cites to Tr. 5564 for the proposition that RCN claimed that Verizon would not allow it to box "any poles" in Quincy. The cited text actually states that Verizon had boxed 20% of the poles but would not allow RCN to box "additional poles." RCN noted in countless other places in the record that Verizon had agreed to allow boxing on the 20% of the poles in Quincy which were already boxed but banned boxing on the remaining 80% which Verizon had not boxed. *See, e.g.*, Response of RCN-BecoCom, L.L.C. to Supplemental Comments of Bell Atlantic-Massachusetts at 9, reproduced as App. A to RCN's October 16, 2000 Opposition to Verizon's FCC 271 Application. In fact, RCN never claimed that Verizon would not allow it to box the 20% of the poles which were already boxed. It appears that the MDTE has fundamentally misunderstood RCN's allegations.

B. Little Weight Should Be Accorded MDTE's Views

While the MDTE's views are part of the record to be evaluated by the Commission, it is important to emphasize that section 271 does not indicate that its findings are entitled to any particular weight.²⁸ Unlike section 271(d)(2)(A) which directs the Commission to give "substantial weight" to the recommendations of the Attorney General, the statute is silent in respect to the findings of state Commissions. This Commission has accordingly found that the recommendations of a state PUC must be evaluated with no presumptions or deference in favor of its views. It has indicated that, while ultimate fact finding discretion lies with the Commission, it will give measured weight to state Commission views based on the extent of that agency's expertise in section 271 matters and the totality of its efforts.²⁹ The Commission must bear in mind that the MDTE does not have the resources available to the FCC or to the New York Public Service Commission, and has chosen in its own section 271 proceeding to eschew strict adjudicatory standards in the conduct of the proceeding.³⁰ To what extent the MDTE has

²⁸ See, e.g., *Bell Atlantic-New York Order* at ¶ 20; *SBC Communications v. FCC*, 138 F.3d 410 at 416 (D.C. Cir. 1998); 47 U.S.C. § 271 (d)(2)(B).

²⁹ *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, rel. June 13, 2000, at ¶ 11.

³⁰ See MDTE Legal Notice in DTE 99-271 and Interlocutory Order entered August 19, 1999.

been misled by reliance on unacknowledged or unreported ex parte contacts from Verizon or others in or out of state government, is unknown to RCN.³¹

RCN's comments on the MDTE Evaluation will largely concentrate on the issue that RCN has chosen to emphasize in its Opposition to the Verizon application – the issue of "boxing" of poles. No doubt other CLECs will focus on other checklist items or other elements of checklist item # 3. The only MDTE's findings other than those related to boxing to which RCN will refer in these Reply Comments are those relating to Verizon's Performance Assurance Plan ("PAP"). RCN does so not only because the MDTE decision approving the PAP³² falls far short of what is required to protect the public interest, and is rife with errors and omissions but also because the uncertainty about the status of the PAP implies that this Commission should accord little weight to the MDTE's conclusions on substantive issues including pole boxing.

C. The MDTE Misunderstands Sections 224 and 271 Of The Act

The MDTE's conclusion quoted above that Verizon may box whichever poles it finds it convenient to treat that way, and then freely and lawfully deny CLECs and cable overbuilders

³¹ The plethora of brief filings supporting the Verizon application, some of which simply adopt what must have been model laudatory language proposed by Verizon, suggests that Verizon has been busy ginning up support from the public at large. While such filings are proper and are entitled to be reviewed, it is to be doubted that most, if any, of those members of the public supporting Verizon's application have any understanding at all of the specific statutory context in which the merits of Verizon's application must be addressed and resolved. The profusion of such filings certainly demonstrates that Verizon has an energetic and diligent public relations staff; they are of little other evidentiary value.

³² See Order Adopting Performance Assurance Plan, DTE 99-271, dated September 5, 2000, as amended September 22, 2000.

the right to box other poles so long as all potential attachers are equally discriminated against – for that is the clear import of the MDTE ruling – is truly surprising coming from a regulator which only recently issued a very pro-consumer and pro-competitive amendment to its pole attachment rules.³³ In any event, this interpretation of the meaning of sections 224, 251 and 271 is at odds with a good deal of prior authority and should be forcefully rejected by the Commission.

As interpreted by this Commission, section 224 (f) imposes on pole-owning utilities an affirmative duty to take all reasonable steps to expand capacity to accommodate attachers:

We reiterate that the principle of nondiscrimination established by section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs. Furthermore, before denying access based on a lack of capacity, a utility must explore potential accommodations in good faith with the party seeking access.³⁴

The Commission has also observed, with respect to non-electrical utilities' denials of access, that "the issues will be very carefully scrutinized, particularly when the parties concerned have a competitive relationship. Thus, non-electrical utilities generally must accommodate requests for

³³ See MDTE Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way and to Enhance Consumer Access to Telecommunications Services, Docket No. 98-36, adopted July 26, 2000, available at <http://www.magnet.state.ma.us/dpu/telecom/98-36/final.htm>. The revised rules can be accessed at <http://www.magnet.state.ma.us/dpu/telecom/98-36/regs.htm>.

³⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, (CC Docket No. 96-98), Order on Reconsideration, 14 FCC Rcd 18049 (1999) at ¶ 51.

access, except for reasons of capacity, safety, reliability and generally applicable engineering purposes that cannot reasonably be ameliorated by modification."³⁵ Nothing could be more clear than this: Verizon must affirmatively seek to meet RCN's needs for attachment as proactively and aggressively as it would seek to meet its own. This is a baseline obligation, and would exist even if Verizon had not already boxed some 20% of its own poles in Quincy.

If the MDTE's reading of the nondiscrimination provisions of sections 224, 251 and 271 of the Act were allowed to stand, any BOC could simply and with impunity manipulate any of the 14 checklist criteria as needed for its own immediate purposes and, having done so, simply declare that it would thereafter withdraw from all CLECs whatever checklist capability is the subject of its action. Provided only that it froze out all CLECs without discriminating among them, presumably, section 271 would be complied with under MDTE's boxing theory. Indeed, if the MDTE's approach to section 271 were correct, the incorporation of section 224 into section 271 means that all pole-owning utilities (and not just BOC's needing section 271 authority) could flagrantly discriminate in this way. There is, quite simply, no basis in any FCC or MDTE precedent for the very narrow interpretation of federal law on which the MDTE relies.

More specifically, the MDTE contends that Verizon's boxing policy is "not an unnecessary restriction on licensees because the policy is designed to protect existing facilities

³⁵ *Id.* at ¶ 11 (footnotes omitted).

on poles and because [Verizon's] policy does not unduly affect any particular licensee or unfairly advantage [Verizon]."³⁶ Neither of these conclusions withstands close examination.

1. Protection of existing facilities

The MDTE record does not support the proposition that the ban on additional boxing protects existing facilities. All that the record shows is that Verizon claimed – without a scintilla of data – that boxing made later servicing of poles more cumbersome or expensive.³⁷ In its October 16th 2000 Opposition RCN demonstrated that this objection to boxing is out-of-date, not widely recognized in the industry, and was not shown by Verizon to be an appropriate counterbalance to the significant advantage of boxing, *i.e.*, acceleration of make-ready and therefore of the inauguration of competitive service.³⁸ RCN noted as well that, even if this objection were valid, there was no material in the MDTE record to explain why Verizon had boxed 20% of the poles in Quincy, but then refused to permit RCN to box others. If a ban on boxing is valid on the grounds relied upon by the MDTE, and RCN disputes that it is, then at the least it would have been valid for the 20% of the poles in Quincy which Verizon has boxed or allowed to be boxed. Once having boxed those poles, however, it is only fair to allow others to

³⁶ MDTE Evaluation at 247.

³⁷ See MDTE Tr. 4140-41.

³⁸ See RCN Opposition, App. G at 3-5.

be boxed, even if boxing does create downstream make-ready problems (which, again, is not demonstrated in the MDTE record).³⁹

2. No undue effect on any CLEC or unfair advantage to Verizon

In all candor, it is quite mystifying how the MDTE could have concluded on the record before it that Verizon's discrimination on boxing has had no undue effect on any CLEC or produced any unfair advantage for Verizon. Because boxing eliminates the need for elaborate make-ready work by freeing for attachment of wires the normally unused side of a pole, it accelerates the build-out of wire-based systems. That is why RCN wishes to use it. The record shows that RCN needs access to many more poles than others because its business plan emphasizes residential, rather than commercial service.⁴⁰ The disadvantage to RCN of being unable to box poles in these circumstances is amply set forth in the MDTE record. As to the presence or absence of any undue advantage to Verizon, there is nothing in the MDTE record to show that Verizon was not advantaged in some fashion by its agreement to box 20% of the poles

³⁹ At the risk of anticipating problems which have not yet appeared, RCN notes that Verizon's initial decision not to address the merits of boxing in its initial Application should preclude it, under the Commission's 271 filing guidelines, from first introducing any evidence about boxing in its Reply Comments since it knew unmistakably that boxing was a contested matter but elected not to so much as mention the word in its filing. See RCN's October 16th 2000 Opposition at 6-7 and the Commission's decision in *Application by Bell Atlantic-New York for Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 36, *affirmed sub nom. AT&T v. FCC*, 230 F.3d 607 (D.C. Cir., 2000) (footnote citation to *Ameritech Michigan Order*, 12 FCC Rcd at 20575, omitted). See also DOJ Evaluation at 7, n. 28 observing that Verizon neglected to address RCN's boxing concerns fully in its Application.

⁴⁰ See RCN Opposition of October 16th, 2000, at 7.

in Quincy.⁴¹ However, the burden of proof does not lie on a competitor in a section 271 proceeding to show that the applicant benefits from a closed or discriminatory market; the burden of proof is on the BOC which engages in differential treatment of a new applicant to show that the market is truly open.

Apart from these evidentiary issues, there is a logical flaw in the MDTE's analysis. The MDTE concludes that Verizon's boxing prohibition is "not an unnecessary restriction on licensees" both because it is designed to "protect existing facilities on poles" and because it does not "unduly affect any particular licensee or unfairly advantage [Verizon]." The latter assertion is difficult to follow. There is simply no logical connection between the "necessariness" of the restriction and whether it unduly hurts or helps. It is a *non sequitur*, pure and simple.

The last sentence of the MDTE's conclusionary paragraph on boxing is equally unfounded. It declares that Verizon's boxing policy is nondiscriminatory because "[Verizon] no longer boxes for itself." *Id.* Does this mean that with respect to pole attachments the BOC can phase in and phase out any attachment technique, as it deems it convenient or desirable to do so, and thereby control what attachment techniques are available to attachers? Does this principle apply to other checklist items, and if so, does it mean that Verizon is not obligated to provide other checklist items when it decides it no longer wishes to do so for itself or any other carrier? It

⁴¹ While admittedly purely speculative, Verizon could have negotiated with some other CLEC or cable overbuilder to allow boxing in exchange for some unrelated favorable treatment by the attacher or perhaps for the forbearance of the filing of a formal complaint. The evidentiary burden in this respect was surely Verizon's and it chose silence. Again, any further information at this point tendered by Verizon would be a breach of the Commission's injunction to address known disputes in the initial filing.

seems improbable that the principle can be applied so broadly. Why, then, is it applied to boxing?

Nor is the possibility of filing a pole attachment complaint, on which the MDTE relies in lieu of requiring boxing, an adequate remedy.⁴² The sufficiency of Verizon's compliance with section 271 is not related to the quantum of proof required to prevail in a pole attachment complaint under the MDTE's rules.⁴³ Even the MDTE recognizes that this is so, noting that its findings under section 271 have no precedential value in any adjudicatory pole access proceeding.⁴⁴ The only purpose served by referring to the possibility of filing a formal complaint is to deflect a weakness in Verizon's application to a subsequent proceeding. But one procedural setting has nothing to do with the other. If it were otherwise, Congress would have specified that BOC compliance with the checklist items would be presumed unless a CLEC or overbuilder had prevailed in a formal complaint against that BOC at the FCC or at the state PUC. But that, of course, is not the law, and for good reason. The MDTE's reference to the possibility of filing a formal complaint suggests that, while the opponents of granting section 271 authority to Verizon are being given short shrift by the MDTE, they can try again later in a different context. This is

⁴² See, e.g. MDTE Evaluation at 248: "Moreover, if a licensee believes that a pole attachment rate is unreasonable, the Department has complaint procedures wherein a licensee may file an action alleging unreasonable pole attachment rates." (Footnote reference omitted). See also MDTE Evaluation at 250.

⁴³ In a formal complaint, the burden of proof is generally on the complainant. See, e.g., 47 C.F.R. § 1.1409(b), (d). In a section 271 proceeding, however, it lies with the applicant. See *Bell Atlantic-New York* at ¶ 47 (ultimate burden of proof rests at all times on the BOC applicant).

⁴⁴ MDTE Evaluation at 250.

cold comfort indeed and should have had no role whatever in the MDTE's consideration of the record and the allegations before it.

D. The MDTE Evades the Holding in *Cavalier Telephone Co. L.L.C. v. Virginia Electric and Power Co.*

Illustrative of the MDTE's lenient approach to Verizon's obligations is its refusal to apply the Cable Services Bureau's recent decision in *Cavalier Telephone Co. L.L.C., v. Virginia Electric and Power Co.*⁴⁵ In *Cavalier* an attacher filed a formal complaint alleging that the local power utility had, through a variety of artifices, effectively denied complainant access to the utility's poles. Among these was the utility's refusal to permit the complainant to box poles in order to expedite attachment of its fiber optic cable to the poles, even when the utility had itself used boxing, brackets, and other devices. The Cable Services Bureau responded affirmatively to the complainant's concerns about discriminatory allowance of boxing as follows:

Respondent cannot discriminate against Complainant in favor of other attachers or itself. That premise is at the heart of the 1996 Act. Respondent has already agreed to allow temporary attachments. Respondent uses extension arms and boxing for its own attachments and must allow other attachers to do the same... . However, we have stated that a utility must take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs and explore potential accommodations in good faith with the party seeking access.⁴⁶

RCN submits that the MDTE's conclusion approving Verizon's boxing practices, as set forth above is simply and flatly inconsistent with the holding in *Cavalier*. Instead of affirming

⁴⁵ 15 FCC Rcd 9563 (CSB, 2000).

⁴⁶ *Cavalier*, at ¶ 19 (footnotes omitted, internal quotations omitted).